UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEACON SALES ACQUISITION, INC. D/B/A QUALITY ROOFING SUPPLY COMPANY,

and

Cases 4-CA-36852 and 4-CA-36879

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 542, AFL-CIO.

RESPONDENT BEACON SALES ACQUISITION, INC. D/B/A QUALITY ROOFING SUPPLY COMPANY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 et seq. of the Board's Rules and Regulations,
Respondent Beacon Sales Acquisition, Inc., d/b/a Quality Roofing Supply Company
("Quality") excepts as set forth below to the findings of fact, failure to find certain facts,
rulings, conclusions of law and recommended order of the Administrative Law Judge
("ALJ") contained in, or omitted from, his decision dated July 29, 2010 in JD-41-10
("JD"). Respondent's exceptions are further supported by the brief filed concurrently
herewith. Respondent also requests oral argument.

Respondent's exceptions are as follows:

1. Respondent excepts to the finding that:

It is undisputed that, effective January 3, 2009, Quality Roofing implemented a unilateral change, without providing the Union appropriate notice and opportunity to bargain, and without the Union's consent, in a mandatory subject of bargaining, specifically, the premium paid by employees for health insurance. Quality Roofing further concedes that when it implemented the health care premium increases, the Union and Quality Roofing had not reached an overall bargaining impasse in their collective-bargaining negotiations. Such a unilateral

implementation is an elementary, and straightforward violation of Section 8(a)(5) of the Act

as an incorrect legal conclusion when applying the correct legal standard to the undisputed facts of this case. (JD 7, LN 31-40);

- 2. Respondent excepts to the finding that <u>Auto Bus, Inc.</u>, 293 NLRB 856 (1989); <u>Quinn Co.</u>, 273 NLRB 795, 799 (1994); and <u>John F. Cuneo Co.</u>, 152 NLRB 929, 931, fn. 4 (1965), "seem to dictate the outcome here" as an incorrect recitation of the law. (JD 8, LN 30-40). In neither of those cases did the Regional Director have the level of involvement in the settlement process that the Regional Director had in this case;
- 3. Respondent excepts to the finding that "In <u>Auto Bus</u>, the Board considered and rejected just such an argument" as an incorrect recitation of the law. (JD 8, LN 43);
- 4. Respondent excepts to the finding that "I am unsure where this leaves Board precedent on the issue" as an incorrect conclusion in light of the well-settled and consistent Board case law on the issue, and that it indicates the ALJ's confusion which led to an incorrect application of the law to the stipulated facts. (JD 9, LN 21);
- 5. Respondent excepts to the related findings that "This is no small matter but the Region is not a party to and cannot enforce the terms of a non-Board settlement.

 Conversely, and reasonably, the Region is not bound by a non-Board settlement," as incorrect recitations of the law. (JD 9, LN 49-51);
- 6. Respondent excepts to the citation to and reliance upon Metropolitan Edison

 Co. v. NLRB, 460 US 693, 708 (1983) as an incorrect insofar as the issue of waiver is inapposite in the context of a "with prejudice" dismissal of a claim. (JD 10, LN 14);

- 7. Respondent excepts to the finding that "The current claim is a different one from the withdrawn claim, involving different facts and elements of proof" as incorrect.

 (JD 10, LN 18-19);
 - 8. Respondent excepts to the finding that:

The withdrawn charge contained no claim of an unlawful unilateral change in health care, or any other subject, and is alleged to have occurred four days earlier, and what is more, the resulting complaint allegation and the stipulated facts demonstrate that the unilateral change actually occurred on January 3, 2009, more than one week after the facts alleged in the withdrawn and settled charge

as incorrect. (JD 10, LN 19-23);

- 9. Respondent excepts to the finding that "On its face, the claim that the Respondent made an unlawful unilateral change is a different claim than the claim that the Respondent falsely claimed impasse on health care" as incorrect under the proper legal standard. (JD 10, LN 23-25);
- 10. Respondent excepts as inapposite under the appropriate legal standard the finding that "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." Allison Corp., 330 NLRB 1363, 1365 (2000); Georgia Power Co., 325 NLRB 420, 420–421 (1998) ("either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter"), end. 176 F.3d 494 (11th Cir.), cert. denied, 528 U.S. 1061 (1999); Lear Siegler, Inc., 293 NLRB 446, 447 (1989) (waivers of employee rights must, however, be explicitly stated, clear and unmistakable)." (JD 10, LN 43-51);

- 11. Respondent excepts to the finding that "First, under the rule of <u>Bottom Line Enterprises</u>, supra, an impasse on the issue of health care does not justify the implementation of a unilateral change in health care premiums. A lawful unilateral implementation requires "an overall impasse has been reached on bargaining for the agreement as a whole," as an incorrect statement of the law under the facts as presented here. (JD 11, LN 3-6);
- Bottom Line rule, but the Respondent does not contend, and there is no evidence to support the contention if it did, that any exception applies here," as incorrect in that Bottom Line is inapposite and there is evidence in the record to support an exception. (JD 11, LN 8-10);
- 13. Respondent excepts to the finding that "The Respondent admits that effective January 3, 2009 "it implemented these [health care premium increases] without affording the Union sufficient opportunity to bargain them, and that the Union did not consent to these changes before they were implemented on January 3, 2009" as an incorrect and incomplete quotation from the parties' stipulation. (JD 11, LN 14-17);
- 14. Respondent excepts to the finding that "The withdrawn charge provides no cover for the January 3, 2009 implementation" as an incorrect legal conclusion under the proper legal standard. (JD 11, LN 22-23);
- 15. Respondent excepts to the finding that "Such an implementation is a violation of the Act" as an incorrect legal conclusion under the proper legal standard. (JD 11, LN 30);
- 16. Respondent excepts to the finding that "At most, the Union waived the right to file a charge alleging that the Respondent falsely declared impasse as to health care on

- December 22. Nothing more can be read into the Union's withdrawal of that charge "with prejudice" as an incorrect legal conclusion under the proper legal standard. (JD 12, LN2-5);
- 17. Respondent excepts to the failure to cite, discuss and/or distinguish respondent's citation to <u>Oreck Direct, LLC v. Dyson, Inc.</u>, 560 F.3d 398, 402 (5th Cir. 2009) which makes clear that a "with prejudice" withdrawal bars subsequent relitigation of claims arising from the same set of operative facts as the first claim and renders the waiver analysis inapposite. (Respondent's Post Hearing Brief at 8);
- 18. Respondent excepts to the failure to recognize the significance of the fact that Respondent's notification to the Union of the health care increase would be implemented in the first pay period of January 2009. (JD 3, LN 27-28);
- 19. Respondent excepts to the incorrect holding that overall contract impasse was required before Respondent could include the collective bargaining unit employees in the company-wide 2009 health care increases after impasse was reached in bargaining over that increase. (JD 11);
- 20. Respondent excepts to the finding that "This sentence says nothing about only meeting in the presence of the FMCS mediator. It says nothing about requiring the parties to use a mediator to conduct each and every bargaining session" as an incorrect reading of the plain language of the Ground Rules Agreement and one that improperly renders the termination provision superfluous. (JD 16, LN 42-44);
- 21. Respondent excepts to the finding that "The mediator was 'utilized' frequently during the negotiations, but there is no explicit requirement that he be at every bargaining session, or that the parties are not bound to bargain in his absence. Such an explicit and unmistakable agreement is not found in this language" as an incorrect reading

of the plain language of the Ground Rules Agreement and one that improperly renders the termination provision superfluous. (JD 15, LN 46-48);

- 22. Respondent excepts to the finding that "I find that the Respondent unlawfully refused to bargain with the Union from July 9 through August 10, 2009" as an incorrect legal conclusion based upon the facts as they are applied under the correct legal standard. (JD 16, LN 7-8);
- 23. Respondent excepts to the finding that "Yet the matter is not trivial. For one, the short duration of the refusal to bargain occurred only because the Union acceded to the Employer's demand to terminate the Agreement. Had the Union stood on principle, as the Employer did, the refusal to bargain might be continuing to this day" as incorrect based upon the plain language of the parties' exchange of correspondence that is in the record. (JD 16, LN 16-19);
 - 24. Respondent excepts to the finding that:

The dispute involves a significant issue of Board precedent regarding the effect, import, and interpretation of bargaining ground rules and parties' negotiating conduct. The parties and the public should have guidance from the Board in such matters so that in future negotiations the parties will be able to avoid this kind of dispute

as incorrect as this dispute raises no novel issues and can be decided based upon well-settled Board law. (JD 16, LN 19-23);

25. Respondent excepts to the finding that:

the Union's conduct was not an admission or even evidence in favor of Quality Roofing's position. Rather, faced with Quality Roofing's refusal to bargain, and given that the unfair labor practice proceedings are now, a year later, far from complete, the Union's notice of termination is reasonably understood as an accommodation to the Respondent's (unlawful) position lest, consistent with its position, the Respondent would still be refusing to bargain to this day

as incorrect based upon a plain reading of the parties' correspondence in the record. (JD

16, LN 38-44);

26. Respondent excepts to the failure to conclude that the plain language of the

parties' Ground Rules Agreement required the Union to bargain with a Federal mediator

until it gave 30-days notice of termination of the agreement (JD 15);

27. Respondent excepts to the proposed Conclusions of Law which is premised

on inappropriate findings of violations of Sections 8(a)(1) and (5) of the Act for the reasons

set forth in the exceptions above (JD 18, LN 9-20);

28. Respondent excepts to the proposed Remedy which is premised on

inappropriate findings of violations of Sections 8(a)(1) and (5) of the Act for the reasons

set forth in the exceptions above (JD 18, LN 25 to JD 19, LN 26);

29. Respondent excepts to those portions of the recommended Order, including

the Appendix, that in any way conflicts with the above-noted exceptions. (JD 18-20,

Appendix);

Respectfully submitted,

BEACON SALES ACQUISITION, INC.

D/B/A QUALITY ROOFING SUPPLY COMPANY

By:

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Dated: August 24, 2010

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CERTIFICATE OF SERVICE

This is to certify that a true copy of Respondent Beacon Sales Acquisition, Inc. D/B/A Quality Roofing Supply Company's Exceptions to the Decision of the Administrative Law Judge was served via electronic mail this 24th of August, 2010 upon:

Frank Bankard International Union of Operating Engineers, Local 542 1375 Virginia Drive, Suite 100 Fort Washington, Pennsylvania 19034

I also certify that I sent via electronic mail a copy to:

Dorothy L. Moore-Duncan c/o Jennifer Spector Regional Director, Fourth Region National Labor Relations Board 615 Chestnut St., 7th Floor Philadelphia, PA 19140

Ross D. Cooper